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No. 00-1751

In the

Supreme Court of the United States

SUSAN TAVE ZELMAN, et al.,
Petitioners,

v.

DORIS SIMMONS-HARRIS, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, INDEPENDENT VOICES FOR BETTER EDUCATION, TEACHERS FOR BETTER EDUCATION, IRA J. PAUL, AND ROBERT N. WRIGHT IN SUPPORT OF PETITIONERS

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25 pp

QUESTION PRESENTED

Ohio's experimental school choice program provides tax-funded scholarships to low-income children who live in the Cleveland City School District. Parents of children in kindergarten through eighth grade may use the scholarships to pay tuition for those children at the private schools of their choosing, including religious schools. In light of Ohio's program, the question presented is as follows:

Whether the Establishment Clause prohibits Ohio's program from authorizing parents to use the scholarships at any private school, whether religious or not.

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation, Independent Voices for Better Education, Teachers for Better Education, Ira J. Paul, and Robert N. Wright respectfully submit this brief amicus curiae in support of Petitioners, Susan Tave Zelman, *et al.*[1] Consent to the filing of this brief has been granted by counsel for all parties. Copies of the general letters of consent have been lodged with the Clerk of the Court.

Amicus Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt organization incorporated under the laws of California for the purpose of participating nationally in litigation matters affecting the public interest. PLF is submitting this brief because it believes its public policy perspective and litigation experience in the area of the First Amendment to the United States Constitution will be of assistance to this Court in its deliberations. PLF has participated in numerous cases before this Court including *Mitchell v. Helms*, 530 U.S. 793 (2000), *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), and *Agostini v. Felton*, 521 U.S. 203 (1997). PLF participated in this case as amicus curiae in the court below.

Amicus Independent Voices for Better Education is a nonprofit, tax-exempt Florida corporation. Together with Teachers for Better Education, its affiliate, this Amicus has more than 1,000 members and supporters consisting of parents and teachers. These groups were formed to improve the quality of education in Florida's public schools. The education reforms they advocate include: limited class size, funding classrooms before administrative functions, the elimination of teacher

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[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae affirm that no counsel for any party in this case authored this brief in whole or in part; and, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

tenure, meaningful teacher competency testing, and vouchers for low-income families. Amici Ira J. Paul and Robert N. Wright are teachers in the Florida public schools.

Amici Independent Voices for Better Education, Teachers for Better Education, Ira J. Paul, and Robert N. Wright are also amici curiae in *Holmes v. Bush* (Circuit Court of the Second Judicial Circuit for Leon County, Florida, Case Nos. CV 99-3370, CV 99-4110). *Holmes v. Bush* involves a challenge to Florida's opportunity scholarship program—a school choice plan substantially similar to the Ohio Scholarship Program at issue in this case—as violating the federal Establishment Clause and state law. Independent Voices for Better Education, Teachers for Better Education, Ira J. Paul, and Robert N. Wright have been granted amicus status to support the school choice program before the Florida court.

Amici believe that the issues raised by the case at bar reach far beyond the Cleveland public schools, presenting a question that goes to the heart of education reform programs across the country: Whether a state program that distributes educational assistance to individuals on the basis of neutral criteria violates the Establishment Clause. Amici believe that it does not and have continually litigated on behalf of the public interest to ensure that effective government programs that remain neutral toward religion do not fall victim to Establishment Clause challenges. Yet until this Court overrules *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and confirms that *Agostini v. Felton*, 521 U.S. 203, and *Mitchell v. Helms*, 530 U.S. 793, embody the Establishment Clause analysis applicable to state voucher programs, endless rounds of costly and divisive litigation will continue in this area. Amici file this brief to urge the Court to grant the petition to resolve that question.

STATEMENT OF THE CASE

Ohio's Pilot Project Scholarship Program (Ohio Scholarship Program) first went into effect in the Fall of 1996. It establishes a pilot project for any school district in the state that has been the subject of a federal court order "'requiring supervision and operational management of the district by the state superintendent.'" *Simmons-Harris v. Zelman*, 234 F.3d 945, 948 (6th Cir. 2000) (citation omitted). Cleveland is the only school district presently in this category.

The Ohio Scholarship Program provides scholarships to children residing in the Cleveland school district and enrolled in kindergarten through eighth grade. *Id.* In admitting students to the program, preference is given to students from low-income families, which the program defines as families whose income is below 200% of the poverty line. *Id.*

The Ohio Scholarship Program permits the participation of private schools, religious or nonreligious, if they are located within the boundaries of the Cleveland school district and meet the state's secular standards for providing an adequate education for all children in the state. *Id.* Each scholarship awarded is payable to the parents of the student entitled to the scholarship, to be used at whichever participating school has been selected by the student's parents. *Id.*

In 1996, soon after the Ohio Scholarship Program was enacted, lawsuits were filed in state court. *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999). The Ohio Supreme Court found the program constitutional under the First Amendment's Establishment Clause for at least two reasons: First, it is perfectly neutral. There is nothing about the program that prevents a school from participating, or facilitates its participation, based on its status as religious or nonreligious,

private or public.[2] Second, not one penny of state money goes to a religious school except through the individual choices of participating families. No child is assigned to a religious school—and therefor, no program revenues are received by religious schools—except through the intervening personal choice of the student's parents.

The Ohio Supreme Court's affirmation of the constitutionality of the program was based on a careful review of this Court's Establishment Clause jurisprudence. The court relied primarily on *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), and the modified *Lemon* test announced in *Agostini v. Felton*, 521 U.S. 203. However, the Ohio high court found the adoption of the Ohio Scholarship Program had violated the single-subject rule of the state constitution. 711 N.E.2d at 216.

The program was re-enacted in all pertinent respects in 1999. 234 F.3d at 949-50. Some of the same plaintiffs then filed a second lawsuit challenging the program in *federal* court. *Id.* On December 11, 2000, by a narrow 2-1 vote, the Sixth Circuit Court of Appeals, in the opinion below, affirmed a permanent injunction preventing the State of Ohio from operating the Ohio Scholarship Program. Relying on the test set out in *Lemon v. Kurtzman*, 403 U.S. at 612-13, the court of appeals held that the program violates the Establishment Clause on the grounds that it has the primary effect of advancing religion and that it constitutes an endorsement of religion and sectarian education. 234 F.3d at 961.

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[2] The program permits public school districts adjacent to the Cleveland district to participate in the program and receive scholarship payments on behalf of parents, although at present none of these public school districts has enrolled. *Zelman*, 234 F.3d at 949.

The lower court looked to the decisions issued by this Court applying the *Lemon* test and determined the "most persuasive, in that it is on point with the matter at hand, to be *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 . . . (1973)." 234 F.3d at 953. In *Nyquist*, this Court invalidated a tuition-reimbursement and tax credit program where public education assistance was made available only to parents of children in *nonpublic* schools. 413 U.S. at 780. The *Nyquist* Court recognized that such a narrow class of recipients "cannot be squared with the principle of neutrality established by the decisions of this Court." *Id.* at 793. As the dissent noted,

> [t]he purpose of the Ohio statute, on the other hand, is to provide financial help to poverty-level students attending the public schools in Cleveland in order to enable them, if they wish, to attend nonreligious private schools, religious private schools, public schools in neighboring districts that wish to participate in the voucher program, or to obtain special tutoring while remaining in the Cleveland public schools.

Zelman, 234 F.3d at 964-65 (Ryan, J., dissenting).

The Sixth Circuit rejected the Ohio Supreme Court's reasoning that "'the *Nyquist* holding [had been] undermined' by subsequent cases and was thus no longer good law." 234 F.3d. at 949 (citation omitted). Instead, the court below noted that "[t]he Supreme Court has not overturned or rescinded the *Lemon* test even as it has used its framework to shape differing analyses," *id.* at 952, and read this Court's recent pronouncements as illustrating the "flexibility" of the *Lemon* test. *Id.* at 953.

The court of appeals noted that in *Agostini v. Felton*, 521 U.S. at 237, this Court stated:

> "[W]e do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent" . . . "that if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

234 F.3d at 954-55. Although the *Nyquist* opinion has not been overruled, clearly some of its reasoning has been undermined by more recent Establishment Clause jurisprudence.

The Sixth Circuit also recognized that this Court's recent decision in *Mitchell v. Helms*, 530 U.S. 793, was sharply divided. Instead of applying Justice Thomas' plurality opinion upholding the constitutionality of a federally mandated Louisiana program in which the principals of neutrality and private choice were emphasized, the Sixth Circuit applied Justice O'Connor's narrow opinion concurring in the judgment. 234 F.3d at 957. Thus, according to the court below, *Mitchell* requires an inquiry into whether state funds have been diverted to religious uses. *Id.* But this type of diversion inquiry is applicable only in the context of a public program in which the government provides funds directly to religious schools. The diversion inquiry does not apply when the program gives funds to the "student beneficiary;" instead, who "can attend a religious school and yet retain control over whether the secular government aid will be applied toward the religious education." *Mitchell*, 530 U.S. at 842 (O'Connor, J., concurring).

Despite the urging of the dissenting judge to take the case for *en banc* review because of the "immense importance to the Cleveland children who are directly affected, and indeed to the nation," 234 F.3d. at 974 (Ryan, J., dissenting), the Sixth Circuit denied the motion.

SUMMARY OF ARGUMENT

In *Lemon v. Kurtzman*, this Court articulated a three-part test to evaluate possible Establishment Clause violations. *Lemon* stated that, to pass constitutional muster under the Establishment Clause, a statute or government action must have a secular legislative purpose, its primary effect must be one that neither advances nor inhibits religion, and it must not foster an excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-13. Until this Court expressly declares that *Lemon* is no longer the law, courts throughout this country will continue to struggle with *Lemon*'s imprecise test.

While this Court has not formally repudiated *Lemon*, its recent decisions have failed to rely on the three-pronged test set forth in that decision. Instead of passing Establishment Clause claims through the three prongs of *Lemon*, this Court has instead asked whether the government's action was a neutral benefit available to all handicapped children, *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, or acts neutrally toward religion, *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994). Although this Court modified the *Lemon* test in *Agostini v. Felton*, 521 U.S. 203, it did not expressly overrule *Lemon*. As a consequence, the Nation's lower courts must struggle to apply the confusing and indeterminate *Lemon* test, only to have this Court review those decisions under different constitutional standards. An inefficient and unpredictable two-tiered system of Establishment Clause jurisprudence has resulted.

In recent Establishment Clause cases, this Court has explained that government programs that neutrally provide benefits to a large class of citizens do not offend the First Amendment simply because a religious institution might receive an indirect benefit. *Everson v. Board of Education of the Township of Ewing*, 330 U.S. 1, 18 (1947); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1. This Court

should grant certiorari in the present case to declare expressly that the neutrality test laid out in *Agostini*, and not the three-pronged test announced in *Lemon*, should be used to determine whether the Establishment Clause has been violated.

ARGUMENT

I

THIS COURT SHOULD ACCEPT THIS CASE TO OVERTURN *LEMON v. KURTZMAN*

Thirty years ago, in *Lemon v. Kurtzman*, this Court formulated a three-part test for determining whether state aid to sectarian schools complies with the First Amendment: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" 403 U.S. at 612-13 (citations omitted). This three-pronged test has been the subject of strong criticism by members of this Court.

> Our cases interpreting and applying the purpose test have made such a maze of the Establishment Clause that even the most conscientious governmental officials can only guess what motives will be held unconstitutional.

Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting).

> If a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results, I see little use in it.

Wallace v. Jaffree, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting).

This Court's Establishment Clause jurisprudence remains in disarray even after its decisions in *Agostini v. Felton*, 521

U.S. 203, and *Mitchell v. Helms*, 530 U.S. 793. Although *Agostini* was heralded as eliminating the chaos of Establishment Clause jurisprudence, the meaning of *Agostini* is not clear. In fact, the subsequent decision in *Mitchell v. Helms* shows that this Court itself is divided on how to interpret and apply *Agostini*. Justice Thomas, writing for a plurality of four in *Mitchell*, cited *Agostini* as establishing that "aid that is offered to a broad range of groups of persons without regard to religion" is neutral and therefore constitutional. 530 U.S. at 809. However, Justice O'Connor disagreed, stating that "[the Court] has never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid." *Id.* at 839 (O'Connor, J., concurring).

The unresolved chaos surrounding this Court's Establishment Clause jurisprudence is a direct result of the doctrinal deficiency of the three-part test of *Lemon v. Kurtzman*. This Court should grant certiorari in the present case to explicitly overrule *Lemon* and put an end to the two-tiered system of Establishment Clause jurisprudence that guides aid-to-education cases.

A. The Application of the *Lemon* Test Has Led to Inconsistent and Confusing Results

Cases decided under the three-pronged *Lemon* test are inconsistent with each other and contradict cases decided prior to the adoption of the test. Nowhere has this inconsistency been greater than in the area of public aid to education programs involving religious schools.

In 1947, this Court in *Everson v. Board of Education of the Township of Ewing*, 330 U.S. 1, upheld a New Jersey statute authorizing local school districts to reimburse parents for the cost of transporting their children to and from school on public transportation. *Id.* at 17. The reimbursement was available to all parents irrespective of whether their children went to public

or private schools. The Court recognized that general welfare programs neutrally benefitting all persons did not offend the Establishment Clause. *Id.* at 18.

Twenty-one years later, in *Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236 (1968), this Court upheld the constitutionality of a New York statute that required public schools to loan textbooks free of charge to all students, including students attending parochial schools. *Id.* at 238. The *Allen* Court found that the New York statute was a part of a neutrally applied general welfare program. The statute neither advanced nor inhibited religion because the textbooks were merely lent to parochial schools as part of a general program to benefit all schoolchildren regardless of the school attended. *Id.* at 243-44.

In the 1970s, however, this Court moved away from applying a neutrality test to aid-to-education programs. In *Lemon*, the Court examined the constitutionality of a program loaning secular textbooks to private schools and providing salary supplements for teachers. The Court began its inquiry by confessing that

> [c]andor compels acknowledgment . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.

Lemon, 403 U.S. at 612. Relying on *Allen*, the Court found that the loan of textbooks was constitutional, while simultaneously holding that the salary supplements resulted in excessive entanglement with religion. 403 U.S at 614.

Applying *Lemon* in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, this Court held unconstitutional a New York program that provided cash for maintenance and equipment to nonpublic schools serving low-income families. The program also provided a partial tuition reimbursement to low-income parents of students in nonpublic

schools and a tax deduction for other parents of nonpublic school students. *Id.* at 764-69. The *Nyquist* Court held there was no way to ensure that the monies received pursuant to the tuition-reimbursement portion of the program, even though received directly by the parents and only indirectly by the schools, would be restricted to secular purposes. *Id.* at 756. The *Nyquist* Court specifically reserved the question of whether the same outcome would be obtained in "a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, public-nonpublic nature of the institution benefitted." *Id.* at 782 n.38.

In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, this Court overturned the Washington Supreme Court and sustained a program that used government funds to provide vocational rehabilitation services to a blind student attending a Christian college. Reaffirming that "the lines of demarcation in this extraordinarily sensitive area of constitutional law" have been only dimly perceived, this Court found no Establishment Clause violation because the aid did not directly subsidize religion. "Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." 474 U.S. at 487.

From the *Nyquist* decision in 1973 until the *Witters* decision in 1986, this Court attempted to clarify what types of state and federal aid to sectarian schools were permissible. Although various Supreme Court Justices have challenged the

continuing validity of the *Lemon* test,[3] *Lemon* remains the law of the land and courts below must attempt to apply it.

The present chaos of Establishment Clause jurisprudence is highlighted by this Court's application of the retooled *Lemon* test announced in *Agostini v. Felton*, 521 U.S. at 203, 230-33, to the school aid program addressed in *Mitchell v. Helms*, 530 U.S. 793. In *Agostini*, this Court held that "a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees" who are monitored for religious neutrality in monthly visits. *Agostini*, 521 U.S. at 234-35. The *Agostini* Court stressed that it was not revising "the general principles we use to evaluate whether government aid violates the Establishment Clause." *Id.* at 222. *Agostini* simply modified the analytical framework of the three *Lemon* prongs.

This Court's first opportunity to employ the newly modified purpose and effect test arose three years later in *Mitchell v. Helms*. Yet, the plurality opinion in *Mitchell* applied these tests in a narrow fashion, reaffirming that neutrality would be established if the aid flowing to the religious institution was the result of the private decisions of individuals, not the state.

One need look no further than the facts of this case to see the strange results the *Lemon* test has generated. The Sixth Circuit relied upon the *Nyquist* decision to find the Ohio Scholarship Program unconstitutional; whereas, the Ohio

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[3] *See Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring); *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) (Kennedy, J., joined by Rehnquist, C.J., White & Scalia, JJ., concurring in the judgment in part and dissenting in part).

Supreme Court relied upon *Witters* to find the same program constitutionally sound. It is apparent that the outcome of state aid-to-education programs challenged as violating the Establish Clause is dependent upon which line of cases the lower court chooses to follow, and which line they choose to discount.

In order to end this doctrinal chaos, this Court should grant the present petition and overturn *Lemon*.

B. This Court Should Resolve the Two-Tiered System of Establishment Clause Jurisprudence

Although its subsequent decisions suggest *Lemon* may have fallen out of favor with this Court, the lower state and federal courts are constrained to apply the three-part test until it is expressly overruled. In *Agostini v. Felton*, this Court reminded the lower courts:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Agostini, 521 U.S. at 237 (citation omitted).

The uncertainty surrounding the applicability of *Lemon* has led to a two-tiered system of Establishment Clause jurisprudence, with lower courts applying the *Lemon* framework and this Court applying a different test. The discordant results achieved by this split-level system can be seen by evaluating this Court's more recent Establishment Clause cases.

Zobrest v. Catalina Foothills School District, 509 U.S. 1, involved a challenge by a deaf student to a school district's refusal to provide him with a sign-language interpreter to aid in his studies at a parochial high school. The school district contended that the Establishment Clause prohibited it from providing the requested interpreter. The Ninth Circuit applied the *Lemon* test and concluded that the placement of the interpreter in the parochial school would violate the Establishment Clause. *Id.* at 5. This Court reversed that ruling because the provision of interpreters was a neutral benefit available to all handicapped children in the school district, regardless of the sectarian or nonsectarian nature of the school; thus, the Establishment Clause was not violated. *Id.* at 10.

This Court employed a similar analysis in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994). There, taxpayers brought an action challenging the constitutionality of a New York statute that created a special school district for members of the Satmar Hasidim religion. The state trial court found that the statute failed all three prongs of the *Lemon* test and, therefore, violated the Establishment Clause. *Id.* at 695. The state appellate court agreed. *Id.*

Although this Court ultimately agreed with the conclusions of the lower courts, it did so by employing a wholly different analysis. Instead of applying *Lemon*, this Court rested its decision on the fact that the statute in question extended a governmental benefit in a nonneutral fashion.

The judicial inefficiency of using one test throughout the lower courts, only to change the analysis when the case reaches the Nation's Highest Court was not lost on the dissenting Justice.

> [T]he Court's snub of *Lemon* today (it receives only two "see also" citations, in the course of the opinion's description of *Grendel's Den*) is particularly noteworthy because all three courts below (who are not free to ignore Supreme Court precedent at will) relied on it, and the parties (also bound by our case law) dedicated over 80 pages of briefing to the application and continued vitality of the *Lemon* test. In addition to other sound reasons for abandoning *Lemon*, it seems quite inefficient for this Court, which in reaching its decisions relies heavily on the briefing of the parties and, to a lesser extent, the opinions of lower courts, to mislead lower courts and parties about the relevance of the *Lemon* test.

Id. at 750-51 (Scalia, J., dissenting) (citations omitted).

This two-tiered standard was dramatically highlighted in *Agostini v. Felton*, wherein petitioners sought to have this Court reconsider its earlier decision in *Aguilar v. Felton*, 473 U.S. 402 (1985). In *Aguilar*, this Court applied *Lemon* to bar New York City from sending public school teachers into parochial schools to provide remedial education for disadvantaged children under a congressionally mandated program. *Id.* at 404. This ruling forced school districts throughout the Nation to seek creative ways to provide sorely needed educational assistance to children attending parochial schools. *Agostini*, 521 U.S. at 213.

Frustrated with the exorbitant costs of maintaining this program, New York City, along with parents of parochial school students, brought a motion seeking relief from the permanent injunction imposed under *Aguilar*. The Second Circuit Court of Appeals observed that the landscape of Establishment Clause jurisprudence had changed, but felt bound by the precedent of *Aguilar*. *Id.* at 212. Granting certiorari in *Agostini*, this Court announced a new, modified *Lemon* test. Under the new standard, this Court held that the Establishment Clause no longer prohibits state programs from placing publicly employed teachers on the premises of parochial schools in order

to provide remedial and supplemental secular education to disabled and disadvantaged children. *Id.* at 234-35.

In each of these cases the lower courts reviewed the Establishment Clause issue under the *Lemon* test, and in each instance this Court ultimately employed a different standard to determine whether that clause had been violated. Not only is this dual regime inefficient and confusing, it makes the level of constitutional protection indeterminate, varying according to the facts of each case. Until this Court expressly declares that *Lemon* is no longer the law, courts throughout the country will continue to scrutinize fact patterns in search of secular purposes, primary effects, and excessive entanglements. This Court should accept this case to explicitly overrule *Lemon*, to end the current two-tiered system of Establishment Clause jurisprudence, and to hold that so long as the government provides benefits in a neutral manner, the Establishment Clause is not offended.

II

THIS COURT SHOULD ACCEPT THIS CASE TO REAFFIRM THAT THE DISTRIBUTION OF A GENERAL GOVERNMENT BENEFIT IN A NEUTRAL FASHION DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

This Court has long recognized that the First Amendment requires the government to remain neutral toward religion.

> That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.

Everson v. Board of Education of the Township of Ewing, 330 U.S. at 18. More recently, the Court has reaffirmed the principle of neutrality in dealing with religion.

> [W]e have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

Zobrest, 509 U.S. at 8.

> [T]he [neutrality] principle is well grounded in our case law, as we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges.

Kiryas Joel, 512 U.S. at 704.

The Ohio Scholarship Program in the case at bar is an excellent model of the type of government program that survives constitutional scrutiny under a religiously neutral examination. The focus of the program is on low-income families with children trapped in the failing Cleveland public school system, and the scholarship aid is available to students regardless of the public or nonpublic nature of their school of choice. *Zelman*, 234 F.3d at 948. Participation in the Ohio Scholarship Program by educational institutions is based entirely on religiously neutral criteria. *Id.* at 948-49. No preference for parochial schools is given; no preference for secular schools is given. *Id.*

When the government offers a neutral service that is not designed to help religion, the evil sought to be avoided by the Establishment Clause, the establishment of a national church, is not implicated. *See Wallace v. Jaffree*, 472 U.S. at 106 (Rehnquist, J., dissenting). "The Establishment Clause does not demand hostility to religion, religious ideas, religious people, or religious schools." *Kiryas Joel*, 512 U.S. at 717 (O'Connor, J., concurring). The neutrality test ensures that the

government does not favor a particular religion, *id.* at 709; at the same time, the test does not force government to discriminate against religious institutions. This Court should grant certiorari in the present case to reaffirm that wholly neutral aid programs such as the Ohio Scholarship Program fully comply with the requirements of the Establishment Clause.

III

THIS CASE PRESENTS CONSTITUTIONAL ISSUES OF NATIONWIDE IMPORTANCE THAT CAN ONLY BE RESOLVED BY THIS COURT

A reaffirmation by this Court of a neutrality-based Equal Protection standard would have profound beneficial consequences for all American children enrolled in failing public schools. The 2000 National Assessment of Educational Progress disclosed that 63% of black and 56% of Hispanic fourth-graders are below the most basic levels of proficiency in reading. National Center for Education Statistics, *The Nation's Report Card: Fourth-Grade Reading 2000* (2001) at 31, 33. Across the country, the school choice movement is securing enactments to improve our failing schools. In 1999, it secured an education tax credit program in Illinois, two new charter school laws, and it continues to gain acceptance at the state level. Amici especially direct the Court's attention to the importance of such a ruling in confirming the constitutional soundness of the Florida A-Plus choice and accountability plan.

Florida was the first state to offer a "money back guarantee" for students trapped in failing schools. The Florida plan allows students statewide who have been enrolled for two out of four years in a failing public school an opportunity to attend a better public, private, or religious school of their choice by providing state-paid tuition scholarships. Governor Bush, in his foreword to *School Choice 2000*, explained the elements of the plan: The state's public schools are graded based on how

well their students perform on tests administered in grades three through ten. When a public school has failed for two years running (that is, when 60% of the school's students score below the basic level in reading, math, and writing) its students are eligible to receive vouchers that enable them to transfer to another public or private school of their choice. Nina Shokraii Rees, The Heritage Foundation, *School Choice 2000* (2000) at v-vii.

Currently, more than 50 students in Pensacola are attending private schools through this program, and more than 70 Pensacola students are using the program to attend higher-performing public schools. Significantly, since the implementation of the Florida A-Plus choice and accountability plan almost two years ago, the number of failing public schools in Florida has dropped from 78 to only 4.

Despite the demonstrated salutary effects of Florida's A-Plus plan for both the state's children and their schools, various plaintiffs immediately filed lawsuits against this program, claiming that it violates both federal and state law. *Holmes v. Bush* (Circuit Court of the Second Judicial Circuit for Leon County, Florida, Case Nos. CV 99-3370, CV 99-4110). Recently, the Florida Supreme Court let stand the decision of the First District Court of Appeals upholding the constitutionality of the state's groundbreaking opportunity scholarship program. 767 So. 2d 668 (Fla. Dist. Ct. App. 2000), *review denied*, 2001 Fla. LEXIS 952 (Apr. 24, 2001). The appellate court decision stated that public funds may be spent in private schools under certain circumstances, including through Florida's A-Plus plan. 767 So. 2d at 675. The case is now back before the trial court. The issue of whether it is permissible for a state to use public funds for student tuition in private schools will be addressed in these cases. Amici urge this Court to grant the present petition for certiorari, in part, to clarify that neutral programs such as the Florida A-Plus plan do not offend the Establishment Clause of the First Amendment.

CONCLUSION

This case provides the Court with an opportunity to overrule *Lemon v. Kurtzman* and restore a degree of consistency to Establishment Clause jurisprudence. In recent decisions, this Court has rejected Establishment Clause claims challenging neutral governmental programs. However, by not explicitly overruling *Lemon*, this Court has constrained the Nation's lower courts to toil under the three-part *Lemon* test, scrutinizing fact patterns in search of secular purposes, primary effects, and entanglements. This Court should grant certiorari in this case and clarify, once and for all, that government programs that neutrally provide benefits to a large class of citizens do not offend the First Amendment simply because a religious institution might receive an indirect benefit.

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Respectfully submitted,

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